Office - Supreme Court, U. S.
FILED
FEB 23 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 724

CLYDE H. WALKER, *Petitioner*,

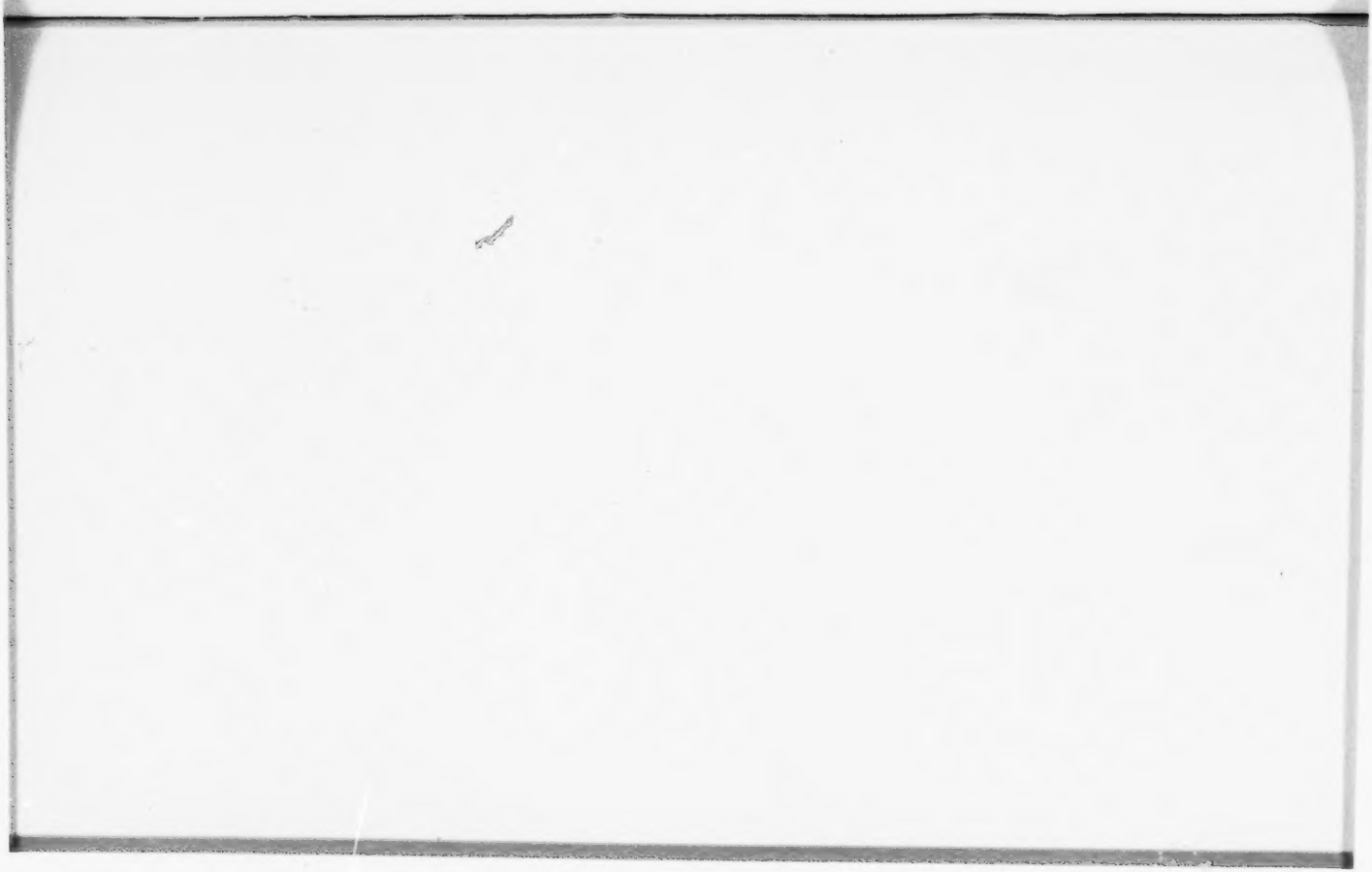
v.

P. J. SQUIER, WARDEN, UNITED STATES PENITENTIARY, McNeil Island, Washington, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

S. WALLACE DEMPSEY,
Counsel for Petitioner,
723 Investment Building,
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



INDEX.

	Page
Petition	1
Statement of Case	3
Specification of Errors to be Urged	5
Reasons for Granting Writ	7
Brief in Support of Petition	9
Opinion below	9
Jurisdiction	9
Question presented, Specification of Errors to be urged and Statement of the Case	10
Argument	10
Preliminary	10
I. The refusal of the Courts to hold that payment of alleged expert's fees violated the two Statutes above described, and the statutory procedure provided thereby, resulted in denying petitioner a fair and impartial trial and violated his constitutional rights	11
II. That the District Court erred in excluding testimony as to bias or prejudice of the so-called expert witness Tarr, and in limiting the proofs to corruption and bribery of him, which proof, so excluded, would have shown that petitioner was denied a fair and impartial trial	14

Page

III. The District Court erred in excluding evidence that (although paid fees as expert witnesses), Raymond P. Tarr, Thomas F. Downing, Jr., and George E. Evans, were not qualified as experts and did not testify as such as in such case the payment of so-called expert's fees to witnesses not experts violated said Statute fixing the fees of witnesses and the established procedure in that respect, and the petitioner was thereby denied a fair and impartial trial..... 17

IV. The destruction of the trial minutes by the Government through its "official court reporter," leaving only a transcript of the testimony of some of the government witnesses, has made it impossible for petitioner to show that the so-called expert witnesses were biased and prejudiced against him and that, through their testimony, and on the case as a whole, petitioner was denied a fair and impartial trial as guaranteed him by the Constitution of the United States and the Sixth Amendment thereto 19

Conclusion 23

CASES CITED.

Askew v. Odenheimer, Fed. Cas. No. 587 (Baldw. 380). 22
Attorney General, Petitioner, 104 Mass. 537, 544..... 15
Berger v. U. S., 295 U. S. 86, 88, 79 L. Ed. 1321..... 10
Bradley v. Davidson, 47 App. D. C. 285..... 11
Brower v. State, 221 P. 1050, 24 Okla. Crim. 49..... 10
Carter v. Texas, 177 U. S. 442, 447, 44 L. Ed. 839, 841, 20 S. Ct. 687 19
Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 233, 234, 41 L. Ed. 979, 983, 984, 17 S. Ct. 581..... 19
Commonwealth v. Bell, 22 A. 641, 644, 145 Pa. 374..... 13
Commonwealth v. Benedict, 173 A. 850, 114 Pa. Supp. 183 13

Page

Commonwealth v. Sacco, 151 N. E. 830, 255 Mass. 369.10, 15
Davis v. Ivey, Fla., 112 So. 264..... 16
Deuches v. Grand Rapids Brass Co., 215 N. W. 392, 240 Mich. 266 22
Dickson v. People, 168 Ill. 179, 39 L. R. A. 116, 48 N. E. 108 11
Dishon v. Smith, 10 Iowa 212, 221, 1 Words & Phrases, p. 868 13
Gaugh v. Gaugh, 11 S. W. (2d) 729, 321 Mo. 414..... 22
Haid v. Prendiville, 238 S. W. 452, 292 Mo. 552..... 23
Harrison v. State, Tex., 151 S. W. 552, 553..... 13
Henkel v. Chicago, St. M. & O. R. Co., 284 U. S. 444, 447 .....11, 11
Hudson v. Hudson, 122 N. E. 497, 287 Ill. 286..... 23
Hunt v. Sanders, 232 S. W. 456, 288 Mo. 337..... 23
Kendall v. Ewart, 259 U. S. 139..... 20
Larrison v. U. S., 24 F. (2d) 82..... 16
Lisenba v. Calif., 314 U. S. 236, 237, 86 L. Ed. 180..... 15
Martin v. U. S., 17 F. (2d) 973..... 15
McKnight v. Washington Nat. Ins. Co., 131 S. W. (2d) 1072 21
Middleton v. Middleton, 68 S. W. (2d) 1003, 188 Ark. 1022 22
Miller v. U. S., 120 F. (2d) 968, 969, 973..... 12
Mooney v. Holohan, 294 U. S. 112, 113, 79 L. Ed. 794.. 19
People v. Peters, 106 N. E. 513, 515, 265 Ill. 122, Anno. Cas. 1916-A 813 13
People v. Van DeCarr, 84 N. Y. S. 461, 463, 87 App. Div. 386 13
Rogers v. Alabama, 192 U. S. 226, 231, 48 L. Ed. 417, 419, 24 S. Ct. 257..... 19
Russell v. Bush, 71 So. 397, 196 Ala. 309..... 22
State ex. rel. Dept. of Agriculture v. McCarthy, 299 N. W. 581, 238 Wis. 258..... 22
Seavey v. Seymour, 21 Fed. Cas. 947, 953..... 20
Seehorn v. Gaugh, 11 S. W. (2d) 750, 321 Mo. 456..... 22
Stevens v. Worcester, 196 Mass. 45, 56, 81 N. E. 907 and 40 Cyc. 2187 11
Tilton v. Iowa Oil Co., 33 P. (2d) 446, 139 Cal. App. 93. 22
Waley v. Johnston, 316 U. S. 101..... 20
Walker v. Johnson, 312 U. S. 275, 286, 85 L. Ed. 836, 12, 16, 18

Page

Walker v. Squier, Vol. 139 F. (2d) 28.....3, 4, 9
Walsh v. People, 65 Ill. 58, 65, 16 Am. Rep. 569..... 13
Weiss v. U. S., 308 U. S. 321..... 12

TEXT BOOKS CITED.

9 Amer. & Eng. Anno. Cas. 949, 953..... 21
17 C. J. S. Sec. 3541, p. 202 10
23 C. J. S. Sec. 1081, p. 519 10
40 Cyc. 2187 11
1 Words & Phrases, p. 868 13

AMENDMENTS TO CONSTITUTION CITED

Fifth Amendment 2
Sixth Amendment 2, 6, 6, 6, 6, 19

STATUTES CITED.

Sec. 88, Title 18, U. S. C. A. 2
Sec. 338, Title 18, U. S. C. A. 2
Sec. 451-466, Title 28, U. S. C. A. 9
Sec. 601, Title 28, U. S. C. A.....5, 11, 12, 12
Appropriation Act. April 27, 1938, Ch. 180, 52 Stat. 268 .....5, 11, 14
Letter from "Official Court Reporter"
Exhibit attached .....Inside rear cover

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. ——

CLYDE H. WALKER, *Petitioner,*

v.

P. J. SQUIER, WARDEN, UNITED STATES PENITENTIARY, McNeil Island, Washington, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

The petitioner, Clyde H. Walker, prays that a writ of certiorari be granted to review an order, made November 24, 1943, to the United States Circuit Court of Appeals for the Ninth Circuit, dismissing the petition for and refusing to grant a writ of habeas corpus to your petitioner. The proceeding was instituted by Appellant Clyde H. Walker who, when he filed his petition for the writ, was a citizen and in custody of P. J. Squier, Warden of the United States Penitentiary at McNeil Island, Pierce County, Washington (hereinafter called the Warden).

Petitioner and another were convicted in the District Court of the United States for the western district of Washington, Southern Division, under an indictment for violation of Section 338, Title 18, U. S. C. A., for using the mails to defraud, and under a second indictment for violation of Section 88 of the same Title, for conspiracy to violate said Section 338. Judgments were entered on such convictions on March 4, 1939 and the term of the sentence thereunder expires in 1947. Petitioner, meanwhile, has been and now is under custody of said Warden, pursuant to said sentence.

The petition for habeas corpus was filed December 24, 1942 pursuant to Sections 451 to 466, incl., of Title 28, U. S. C. A., by which district courts are given jurisdiction to issue the writ and inquire into the cause of restraint of liberty.

The Petition (Tr. 2), Answer of Respondent (Tr. 16), and Traverse (Tr. 19) raise issues of fact under the contention of appellant that he was effectively denied a fair and impartial trial, as guaranteed by the statutes of the United States and the 6th Amendment to the Constitution of the United States, and was further denied his rights of due process, as accorded him by the 5th Amendment of said Constitution, and that by its failure to observe these constitutional and statutory safeguards, the District Court, in the trial of said cause, lost jurisdiction in the premises, the trial of appellant was rendered illegal and void, and that petitioner is entitled to discharge from the effect of said void judgment of conviction, and the sentence imposed thereunder.

The District Court issued its Order in this proceeding requiring the Warden to show cause, on the 22nd of January, 1943, why the prayer of the petition should not be granted. (Tr. 15.) After hearing on this Order, the District Court entered an Order on February 13th, 1943, dismissing the petition for the writ of habeas corpus. (Tr. 32.) By its order of February 26th, 1943, the District Court

authorized appellant to prosecute his appeal in forma pauperis, and certified that there was probable cause and merit in the appeal, and that the appeal was being undertaken in good faith. (Tr. 33.) Notice of appeal was duly served and filed. (Tr. 60.)

On May 8th, 1943, appellant filed in the District Court, his designation of contents of record on appeal (Tr. 61-65), and on the same date filed in the District Court his statement of points on appeal. (Tr. 64-65.) On June 12th, 1943, the Clerk of said U. S. District Court forwarded to the Clerk of said Circuit Court of Appeals transcript of record on appeal which was filed on June 14, 1943; that upon filing the record in said Circuit Court of Appeals, petitioner filed with the Clerk of said Court, a concise statement of the points on which he relied and a designation of the parts of the record which he thought necessary for the consideration thereof. (Tr. 70-78.)

Petitioner had no attorney or counsel in the trial of this case, but himself, without assistance, conducted his own defense.

STATEMENT OF THE CASE.

Petitioner is confined in the Federal Penintentiary at McNeil Island, Pierce County, Washington, pursuant to judgment and sentence imposed upon him by said District Court. His case was appealed to said Circuit Court of Appeals and the opinion affirming the District Court order appears in Volume 139 F. (2d) 28.

The petition for a writ of habeas corpus was filed December 24, 1942. Shortly before that, petitioner learned that the United States, in the prosecution of this case against him, had paid substantial sums of money as so-called expert witness fees to three (3) individuals, to wit, Raymond P. Tarr, Thomas F. Downing, Jr., and George E. Evans, who testified against him and in behalf of the United States at the trial. (Tr. 5-10, incl.)

There was no order of the Court authorizing the hiring of expert witnesses and no entry on the Court Docket that such an order was ever made. No one of these three witnesses was qualified on his examination as an expert; it did not appear from their examination that they testified as experts; and petitioner was ignorant of any claim by the Government that they were experts and testified as such until he learned, on or about August 20, 1942 (Tr. 5, 6), by letter from the U. S. Marshal for said District, that these three witnesses had been paid so-called, or alleged, expert witness fees; and petitioner was ignorant of any claim that these witnesses testified as experts or were paid such fees until said date.

Raymond P. Tarr, one of the alleged experts, previous to testifying, had tried to obtain employment with the United Collieries Company at the mine involved here after petitioner and another were indicted and prior to the trial, and because he was unable to secure such employment, and to secure expert fees he testified falsely against petitioner. (Tr. 8-9.) When Tarr asked for a job in 1937 he told the Company that the property in question here was valuable (Tr. 55), and then testified in 1939 that there was no coal there, that the property was worthless. (Tr. 55-56.) Petitioner did not learn these facts until after his conviction, after the time to appeal had expired. He offered and requested to be allowed to prove these facts and the bias of the witness (Tr. 55-56), but the Court limited the evidence as to the so-called expert witnesses to bribery, thus excluding the evidence that they were not qualified, and did not testify, as experts and were not, for that reason alone, entitled to be paid as such, and also excluded all evidence to show that the witness Tarr was biased and prejudiced against petitioner. (Tr. 49 to 57, incl.)

Said Circuit Court of Appeals affirmed the Order of the District Court (139 F. (2d) 28), on the single ground that the payment of what the Government claimed were expert fees did not constitute bribery, or so prejudice petitioner's

trial as to violate his guarantee of a fair trial and deprive him of his liberty without "due process of law." The Court did not consider the exclusion by the District Court of the evidence offered by petitioner to prove that the so-called expert witnesses were not qualified as such, and did not so testify; that no order was made for their payment; and that the petitioner did not learn of any claim that they were experts or that they were paid fees as such, until long after his conviction and until after his time to appeal had expired; nor did the said Circuit Court of Appeals consider the petitioner's offer to prove that the witness Tarr was prejudiced or biased.

In May 1943, petitioner had obtained the funds with which to prosecute this proceeding at his own expense, whereupon he ordered from the official court reporter of the trial, the testimony of the two witnesses, Evans and Downing, and received in reply a letter, dated May 5, 1943, from said official court reporter, stating that,—

> "* * * early this year I destroyed all notes which I took in the Walker-Sheehy trials in Federal Court. This would preclude my being able to furnish a transcript of the testimony of the witnesses Evans and Downing."

as appears from an annexed copy of said letter to Miss Dorothy Shallow through whom petitioner gave the order.

There was struck off heretofore an incomplete transcript of evidence of these trials, but it is incomplete, which was the reason for ordering the transcript in May 1943 for use in preparing the brief and arguing the appeal in the Circuit Court of Appeals, the hearing and argument being had on October 21, 1943.

SPECIFICATION OF ERRORS TO BE URGED.

1. The courts below erred in refusing to hold that the payment of alleged expert's fees was a violation of the Statute, Sec. 601 of Title 28, U. S. C. A., also Department of Justice Appropriations Act of April 27, 1938, Ch. 180,

52 Stat. 268, and of the statutory procedure provided thereby for the protection of defendants in criminal prosecutions, including your petitioner, and that petitioner was thereby denied a fair and impartial trial and that such payment was a violation of his constitutional rights secured to him by the Constitution of the United States and the Sixth Amendment thereto.

2. That the District Court erred in excluding all testimony as to bias or prejudice of the so-called expert witness Tarr, and in limiting the proof as to the character and attitude of said witness as to corruption and bribery of him, which proof, so excluded, would have shown that petitioner was denied a fair and impartial trial as guaranteed by the Constitution of the United States and the Sixth Amendment thereto.

3. That the District Court erred in excluding evidence that (although paid fees as expert witnesses), the three witnesses, Raymond P. Tarr, Thomas F. Downing, Jr., and George E. Evans, were not qualified as experts and did not testify as such and the payment of so-called expert fees to them violated said Statutes fixing the fees of witnesses and the procedure in that respect, and your petitioner was thereby denied a fair and impartial trial as guaranteed him by said Statutes and by the Constitution of the United States and the Sixth Amendment thereto.

4. The destruction of the minutes of your petitioner's trial by the Government through its "official court reporter," leaving only a partial transcript of the minutes of trial, has made it impossible for petitioner to show fully that said so-called expert witnesses were biased and prejudiced and has made it impossible for petitioner to show fully and accurately that he was, through the testimony of said witnesses and through the evidence as a whole, denied a fair and impartial trial as guaranteed by United States Statutes and the Constitution and the Sixth Amendment thereto.

REASONS FOR GRANTING THE WRIT.

Through the errors specified above, petitioner was denied a fair and impartial trial as guaranteed to him by the Constitution, and the errors arose too late to be available on appeal and this proceeding by habeas corpus is the sole means available to him to secure relief from the unjust and void judgment and sentence under which he is restrained of his liberty.

For the reasons stated, it is respectfully submitted that the petition for a Writ of Certiorari should be granted.

S. WALLACE DEMPSEY,
Attorney for Petitioner,
723 Investment Building,
Washington, D. C.